No. 80-1403

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

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ALEXANDER L. STEVAS,
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SEAFARERS INTERNATIONAL UNION
PACIFIC DISTRICT–PACIFIC MARITIME
ASSOCIATION PENSION PLAN,
Petitioner,

VS.

NOEL ZEONA STONE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), which provides that:

> "* * * the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any [described] employee benefit plan * * *" (ERISA, § 514(a)),[1]

preempt California community property law to the extent the California law requires, contrary to pension plan terms mandated by ERISA, payment of pension benefits directly to ex-spouses of participants?

2. Is an ex-spouse of a participant in an ERISA plan also a "participant" for purposes of ERISA when ERISA specifically provides that:

> "The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit" (ERISA, § 3(7))?[2]

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[1]It is undisputed that the benefit plan involved in the case at bar is governed by ERISA and is not exempt from its provisions.

[2]The following is a list of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

(1) Noel Zeona Stone—Appellee;

(2) Seafarers International Union Pacific District-Pacific Maritime Association Pension Plan—Appellant;

(3) Carpenters Pension Trust for Southern California—Intervening Appellant.

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NOEL ZEONA STONE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the Court of Appeals ((9 Cir. 1980) 632 F.2d 740) is printed in Appendix A. The memorandum decision of the district court ((N.D.Cal. 1978) 450 F.Supp. 919) is printed in Appendix B.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed and entered on September 29, 1980, and its order denying rehearing en banc was filed and entered on November 24, 1980. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves §§ 3(7), 4(a), 4(b), 104(b)(1), 104(b)(3), 104(b)(4), 105(a), 206(d), 209(a)(1)(B), 502(a), 502(g), 514(a), 514(b)(2)(A), 514(c), 4006(a)(3) and 4007(a) of the Employee Retirement Income Security Act of 1974, commonly known as ERISA, which are set forth in Appendix C.[3] Sections 301 and 302(c)(5) of the Labor Management Relations Act are also set forth in Appendix C.[4]

STATEMENT OF THE CASE

Before his retirement, Ward Stone ("Pensioner") worked in employment covered by the Seafarers International Union Pacific District–Pacific Maritime Association Pension Plan (hereinafter "Plan"). That Plan was established under § 302(c)(5) of the Labor Management Relations Act pursuant to a collective bargaining agreement between the Seafarers International Union Pacific District and the Pacific Maritime Association, an association of employers engaged in the steamship, terminal and stevedoring business on the Pacific Coast. The Plan provides pension benefits for unlicensed seamen working on West Coast American flag vessels. The Plan is subject to the Labor Management Relations Act and to ERISA.

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[3] 88 Stat. 834, 839, 839, 848, 849, 849, 849, 864, 866, 891, 892, 897, 897, 897, 1011 (as amended 94 Stat. 1264), 1013; 29 U.S.C. §§ 1002(7), 1003(a), 1003(b), 1024(b)(1), 1024(b)(3), 1024(b)(4), 1025(a), 1056(d), 1059(a)(1)(B), 1132(a), 1132(g), 1144(a), 1144(b)(2)(A), 1144(c), 1306(a)(3), 1307(a).

[4] 61 Stat. 156, 157 (as amended 92 Stat. 2021); 29 U.S.C. §§ 185, 186(c)(5).

Under the terms of the Plan, Pensioner retired on June 1, 1970. Since that date the Plan has paid him a monthly pension benefit of $425.

On September 25, 1974, a California Superior Court entered an interlocutory decree dissolving the marriage of Pensioner and respondent, Mrs. Noel Stone. The decree ordered Pensioner to pay to Mrs. Stone, based on her community property interest in the pension, 40% of the pension benefits to be paid Pensioner. Pensioner, however, did not comply with those terms of the decree.

On May 3, 1977, Mrs. Stone commenced a new action in the California Superior Court against Pensioner and the Plan, alleging that she was the "owner" of "(40%) of the value of the fund operated by defendant PENSION PLAN, and maintained in the name of defendant [Pensioner]," and that the defendants were converting her property for the use of Pensioner each and every month. The complaint sought, as against the Plan, an order directing the Plan to deliver her interest in the pension directly to her as it became payable. The Plan petitioned for removal to the United States District Court for the Northern District of California.

Following removal, the Plan filed its answer to the complaint, and the parties stipulated to facts for the purposes of cross-motions for summary judgment. The Plan moved for summary judgment on the ground that ERISA preempted the California community property law insofar as that California law required ERISA-governed plans to pay benefits directly to ex-spouses of plan participants. Pensioner, who apparently was living in Mexico, never made an appearance.

The district court, holding that ERISA did not preempt California community property law, granted Mrs. Stone's summary judgment motion, ordered the Plan to pay Mrs. Stone her 40% interest in the pension directly as it became payable, and remanded the cause of action against Pensioner to the state court. Since the district court had jurisdiction over the parties when it entered judgment, and since the court would have had original jurisdiction under § 502(a) of ERISA and § 301 of the Labor Management Relations Act, the district court had jurisdiction to adjudicate respondent's claim against the Plan (*Grubbs* v. *General Electric Credit Corp.* (1972) 405 U.S. 699, 700, 702).

A timely appeal was taken. The Secretary of Labor filed an amicus brief on the appeal, in which he stated:

> "The application of state community property law principles can be expected to have a variety of substantial impacts on plans * * *. For this reason, the Secretary believes that to the extent a non-participant spouse's interest is derived only from state property law, that interest is unenforceable against an employee benefit plan, for state property law must yield to the broad preemption language of Section 514" (Amicus Br. of the Secretary of Labor, p. 4).[5]

Prior to oral argument, the Court of Appeals consolidated for all purposes the case at bar with *Carpenters Pension Trust for Southern California* v. *Kronschnabel* (a copy of that order is printed in Appendix D). The Court

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[5]The Secretary did argue that the decision of the district court should be affirmed on another basis. But as discussed below (p. 6, ftn. 6), there is no merit to his position on this point.

of Appeals affirmed, writing separate opinions in each of the consolidated cases (the opinion in *Carpenters Pension Trust, etc.* v. *Kronschnabel* (9 Cir. 1980) 632 F.2d 745 is printed in Appendix E). With respect to the merits, the Court of Appeals determined that this Court's summary dismissal of the appeal in *Carpenters Pension Trust Fund for Northern California* v. *Campa* (1980) 444 U.S. 1028 for lack of a substantial federal question required it to hold that preemption did not exist (Appx. A, pp. A-3—A-4; Appx. D, p. A-67). In sustaining the district court's jurisdiction to reach the merits in the case at bar, the Court of Appeals also held that respondent was herself a "participant" in the pension plan (Appx. A, p. A-8). On November 24, 1980, the Court of Appeals denied the petition for a rehearing en banc (a copy of the order is printed in Appendix F).

REASONS FOR GRANTING CERTIORARI

This case is of great importance to approximately 25 million working people in the United States. The rule established adversely affects the existence and quality of the pension benefits of workers participating in ERISA-covered benefit plans.

In response to an invitation by this Court in the cases of *Retirement Fund Trust of the Plumbing, Heating & Piping Industry of Southern California* v. *Johns* (1980) 444 U.S. 1028 and *Southern California IBEW-NECA Pension Plan* v. *Johnston* (1980) 444 U.S. 1035, which involved the same issue and were summarily disposed of on the same day as *Carpenters Pension Trust Fund for Northern California* v. *Campa* (1980) 444 U.S. 1028, the Solicitor

General of the United States filed a brief amicus curiae. He argued that ERISA does preempt California community property law, but he also suggested that the appeal in *Johnston* should be dismissed for want of a substantial federal question and the petition for certiorari in *Johns* denied on the basis that "[p]lenary consideration by this Court of the questions presented would * * * be premature at this time" because such questions might be resolved by the Ninth Circuit in *Stone* v. *Stone,* the case presently at bar. He said:

> "[T]his conflict undoubtedly will be resolved by the Ninth Circuit's decision in *Stone* v. *Stone, supra.* The court of appeals in that case may well uphold the non-employee spouse's claim on the basis of an implied exception to the anti-assignment provisions of ERISA. Plenary consideration by this Court of the questions presented would therefore be premature at this time" (Amicus Br. of Solicitor General in *Johns* and *Johnston,* p. 14).[6]

The Ninth Circuit did not, however, independently resolve the issues presented. Bound by this Court's dismissal of the appeal in *Carpenters Pension Trust Fund for*

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[6]Having admitted that there is no exception to the ERISA preemption provision, the Solicitor General (and the Secretary of Labor) can no longer argue that orders based on state law which mandate direct payment of pension benefits to ex-spouses are proper on the basis of an implied exception to the anti-assignment provisions of ERISA. The fact is that if the community property law is preempted, it is preempted, and the issue does not arise as to whether a particular provision of that state law conflicts with a particular provision of the federal law which preempts it. In other words, since ERISA preempts California community property law, it is irrelevant whether the California law might conflict with some part of ERISA, i.e., § 206(d).

Northern California v. *Campa* (1980) 444 U.S. 1028 for want of a substantial federal question, the Ninth Circuit held, without more, that ERISA does not preempt California community property law (Appx. A, pp. A-3—A-4). This holding is contrary to the law, contrary to the positions of the Solicitor General and the Secretary of Labor, undermines the goals which Congress sought to achieve in passing ERISA, and could well, as discussed below, have a devastating impact on plans covered by ERISA. Moreover, this Court has left the questions presented here open for its review (*Hisquierdo* v. *Hisquierdo* (1979) 439 U.S. 572, 590, ftn. 24). Clearly, the issues presented now are ripe for and require plenary consideration by the Court.

I. THE RULING AT ISSUE FRUSTRATES THE VERY GOALS CONGRESS SOUGHT TO ACHIEVE IN ENACTING ERISA; IT POSES A SERIOUS THREAT TO THE VIABILITY AND GROWTH OF EXISTING BENEFIT PLANS AND TO THE CREATION OF NEW PLANS.

Congress, through careful balancing of costs and benefits, sought in enacting ERISA to promote formation of new plans, to ensure the continued viability of existing plans, and to foster the growth and improvement of such plans:

> "[S]ince these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to participate or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of se-

curing broader use of employee pensions and related plans" (S.Rept. 93-383, 93d Cong., 2d Sess., 1974, U.S. Code Cong.& Admin.News, p. 4890, 4904).

"[T]he committee is aware that under our voluntary pension system, the cost of financing pension plans is an important factor in determining whether any particular retirement plan will be adopted and in determining the benefit levels if a plan is adopted, and that unduly large increases in costs could impede the growth and improvement of the private retirement system. For this reason, *in the case of those requirements which add to the cost of financing retirement plans, the committee has sought to adopt provisions which strike a balance between providing meaningful reform and keeping costs within reasonable limits*" (ibid.; emphasis added).

It is to be stressed that Congress itself struck the balance between reform and cost. And to ensure that this delicate balance could be upset by no one except itself, Congress passed what may well be the broadest, clearest preemption provision ever enacted:

"(a) • • • the provisions of this title and title IV shall *supersede any and all State laws* insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b).[7]

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[7]Section 4(a) provides that ERISA applies to any employee benefit plan if it is established or maintained by any employer engaged in commerce or industry or activity affecting commerce or by employee organizations representing employees engaged in commerce or industry or activity affecting commerce. Section 4(b) provides for certain exceptions to the applicability of ERISA, none of which are relevant here. Mrs. Stone has stipulated to the fact that the Plan is regulated by ERISA.

"(c) For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. * * *

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans* covered by this title" (ERISA, § 514; emphasis added).

The language of § 514 is simple and its meaning is unmistakable: *any* state action which relates to an employee benefit plan regulated by ERISA is preempted.

And there can be no question that Congress meant exactly what it said. As Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, stated on the floor of the House of Representatives:

"Finally I wish to make note of what is to many the crowning achievement of this legislation, the *reservation to Federal authority the sole power to regulate the field of employee benefit plans.* With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. * * *

"The conferees, *with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans.* Thus, the provisions of section 514 would reach *any rule, regulation, practice or decision of any State,* subdivision thereof or any agency or instrumentality thereof—including any professional

> society or association operating under color of law—*which would affect any* employee benefit plan * * *" (120 Cong.Rec. (Aug. 20, 1974) 29197; emphasis added).[8]

The "narrow exceptions" to the preemption of state law which Congress "specifically enumerated" in § 514(b)(2)(A) of ERISA do not include community property law.

The rule at issue—that ERISA does not preempt California community property law—not only flies directly in the face of Congress' language and intent but undermines the goals of ERISA, leading to severe adverse effects on the workers covered by the plans. The delicate balance between cost and reform established by Congress is upset; the burdens on benefit plans are increased; and the formation of new plans and the provision of expanded benefits and coverage are discouraged. Benefit plans are forced to maintain records, calculate benefits and make payments to an entirely new class of persons—former spouses of pensioners. As one employer explained to the Department of Labor, "it would have to spend an additional $100,000 a year to administer such [dissolution] settlements in just one state" (Pensions Land in Divorce Court, Business Week (Nov. 7, 1977), pp. 104, 108). And this would not include the expense to the plans of appearing in dissolution proceedings and retaining counsel to represent their interests under various state laws. Every additional dollar which must be used for administration means that a dollar less is available for benefit payments.

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[8]Similar statements by Senator Harrison Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, and by Senator Jacob Javits, can be found at 120 Cong.Rec. (Aug. 22, 1974) 29933 and 29942, respectively.

But even if one assumes that the cost and burdens are small, the repercussions could well still be severe. The rule in issue applies to all plans, including those on the verge of insolvency as well as wealthy plans. The added costs and burdens, even if marginal, may be just what it takes to cause the poorer plans to become insolvent.

Further, the effect of the rule in question will have ramifications far beyond the case at bar. There will be endless litigation over state action, and the plans will be subject to multiple regulation. Every state will attempt to subject the multistate plans to the peculiarities of its own domestic relations laws in an effort to achieve what the particular state conceives to be a proper interest of the spouse in the plan and a proper distribution of the benefits. The plans will be subject to the altering of their administrative procedures so as to fit the peculiarities of each state law. The courts will give spouses greater and greater rights, emasculating the protections Congress sought to ensure for plan participants.[9] Congress did not intend such state intermeddling with its carefully crafted balance of pension costs and benefits.

II. THE DETERMINATION THAT THE EX-SPOUSE OF A COVERED EMPLOYEE IS HERSELF A "PARTICIPANT" UNDER ERISA WILL HAVE A DEVASTATING EFFECT ON PENSION PLANS.

The Court of Appeals' determination that Mrs. Stone, the ex-spouse of a covered employee, is herself a "participant"

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[9]For example, a California Court of Appeal has already ruled that a divorced spouse may even coerce the employee to elect early retirement (see *In re Marriage of Gillmore* (1980) 113 Cal. App.3d 319, 322, 169 Cal.Rptr. 811, 812-813, and infra, pp. 13-14).

under ERISA (Appx. A, p. A-8) will have a devastating effect on pension plans and is contrary to the unambiguous requirements of the law.

ERISA specifically defines "participant":

> "The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit" (ERISA, § 3(7)).

An ex-spouse simply does not fall within the ERISA definition of "participant."

The holding that an ex-spouse is nonetheless a "participant" opens up to spouses and ex-spouses a panoply of rights guaranteed to "participants" by ERISA, the fulfillment of which will create an enormous administrative and financial drain on pension plans. For example, § 502(g) of ERISA permits a court to award attorney's fees to a participant who sues his or her pension plan. Therefore, if a spouse brings the pension plan into a divorce proceeding, the court can require the plan to pay the spouse's attorney's fees because he or she is now a participant.

The plans will also now have to keep records of each such "participant's" interests. In addition, ERISA imposes upon pension plans a number of reporting and disclosure obligations to "participants." For example, a participant must receive a summary annual report from the plan each year (ERISA, § 104(b)(3)) and, periodically, a summary

plan description and summary of material plan modifications (ERISA, § 104(b)(1)). And a participant has a right to inspect and obtain copies of various plan documents upon request (ERISA, § 104(b)(3)-(4)), to request a statement of his or her accrued benefits under the plan and whether he or she is vested (ERISA, § 105(a)), and to receive such a statement automatically upon separation from service (ERISA, § 209(a)(1)(B)). The cost of meeting these ERISA requirements will be significantly increased, and, even if it does not force some plans into insolvency or termination, it will at a minimum reduce the funds available to pay out as benefits.

Further limiting the funds available for payment of benefits is the fact that many of the pension plans covered by ERISA are required by ERISA to pay an annual premium to the Pension Benefit Guaranty Corporation based on the total number of plan participants (ERISA, § 4006 (a)(3), § 4007(a)). The annual per-participant premium for single-employer plans is $2.60, and for multiemployer plans it is currently $1.40, eventually increasing to $2.60 (ERISA, § 4006(a)(3)). The addition of spouses and ex-spouses increases the premium, and could approach a doubling of such costs.

A preview of the ramifications of the Court of Appeals' holding has already been given by a California Court of Appeal in *In re Marriage of Gillmore* (1980) 113 Cal.App. 3d 319, 169 Cal.Rptr. 811. That court, in effect, gave the ex-spouse participant status which allowed her to have control over the destiny of the employee—she was given the power to coerce the employee to take early retirement. After

marital separation, Mr. Gillmore became eligible to retire at the age of 50, but elected not to do so. The Court of Appeal essentially held that, under California community property laws, the ex-spouse was entitled to her interest and that if the employee could not pay her from other assets, he would be required to retire (113 Cal.App.3d 322, 169 Cal.Rptr. 812-813).

The havoc which will be created by the decision below demonstrates the compelling necessity of the exercise of this Court's jurisdiction at this time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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(Appendices follow)

APPENDIX

Appendix A

Noel Zeona Stone, Plaintiff-Appellee,

v.

Ward Herbert Stone, Defendant,
and
Seafarers International Union, Pacific District,
Pacific Maritime Association Pension Plan,
Defendant-Appellant,
and
Carpenters Pension Trust for Southern California,
Intervenor-Appellant.

No. 78-2313.

United States Court of Appeals,
Ninth Circuit.

Argued July 9, 1980.
Submitted July 23, 1980.
Decided Sept. 29, 1980.
Rehearing Denied Nov. 24, 1980.

Appeal from the United States District Court for the Northern District of California.

Before WRIGHT, GOODWIN and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Seafarers International Union, Pacific District-Pacific Maritime Association Pension Plan (the Plan) appeals from the district court's grant of summary judgment in favor of Noel Zeona Stone (Noel). *Stone v. Stone,* 450

F.Supp. 919 (N.D.Cal.1978). On the merits, the case presents the question whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, *et seq.*, preempts California community property laws insofar as they require ERISA-regulated employee benefit plans to pay part of a participant's benefits directly to his or her divorced spouse. Also raised is the question whether the district court has jurisdiction over Noel's claim. We affirm.

I

In 1973, Noel instituted dissolution proceedings against her husband, Ward Herbert Stone (Ward), in the California Superior Court for the County of Alameda. On September 25, 1974, that court entered an interlocutory judgment dissolving the marriage. In its interlocutory order, the court ruled that one of the Stones' community assets was a $425 monthly pension pursuant to which the Plan has made payments to Ward since his retirement in 1970. The superior court awarded to Noel a 40% interest in these monthly payments. On October 17, 1974, the court entered a final judgment of dissolution, incorporating the provisions of the interlocutory decree.

From October 1974 to May 3, 1977, Ward failed to comply with the terms of the decree. In particular, he failed to pay to Noel her share of his monthly pension benefits. Noel tried unsuccessfully to join the Plan to her dissolution suit by moving in 1976 to modify the final judgment.

On May 3, 1977, Noel filed suit in the California Superior Court for the County of Alameda against both Ward

and the Plan. She alleged that she was the "owner" of 40% of Ward's share in the fund operated by the Plan, and that Ward and the Plan were converting her property each and every month for the use of Ward. Noel sought an order requiring the Plan to pay 40% of Ward's monthly pension benefits directly to her. The Plan petitioned for removal of Noel's civil action to the district court. Noel did not move to remand the action to state court, and has not otherwise objected to removal. Ward did not appear. Ward has left the country, lives in Mexico, is beyond the reach of state court process, and has no property to be levied upon.

The parties stipulated to the facts for purposes of cross-motions for summary judgment. The issue presented in these motions was whether ERISA preempts a state court from ordering an ERISA-regulated pension plan to pay a plan participant's pension benefits directly to his or her ex-spouse. After determining that it had jurisdiction, the district court held that ERISA does not preempt such state-court orders. Accordingly, the district court granted Noel's motion for summary judgment against the Plan. The district court also held that it lacked pendent jurisdiction over Noel's claim against Ward, and that even if pendent jurisdiction were present, it would be an abuse of discretion to exercise it. Hence, the district court remanded the state claim against Ward to state court.

II

The district court's ruling on the merits was clearly correct. As our decision in *Carpenters Pension Trust v. Kronschnabel,* 632 F.2d 745 No. 79-3032 (9th Cir. Septem-

ber 29, 1980), demonstrates, the Supreme Court's summary dismissal of the appeal in *In re Marriage of Campa*, 444 U.S. 1028, 100 S.Ct. 696, 62 L.Ed.2d 664 (1980) (*Campa*), binds district and circuit courts to the view that ERISA does not preempt state-court orders requiring a pension plan to pay a community property share of a plan participant's monthly benefit payments directly to his or her ex-spouse. The sole question presented by the instant appeal, therefore, is whether the district court properly exercised jurisdiction to reach the merits in this case.

III

As indicated above, Noel did not object to the Plan's removal of the entire case to the district court. It is well-established

> that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 702, 92 S.Ct. 1344, 1347, 31 L.Ed.2d 612 (1972). We have held that the *Grubbs* rule is applicable when the merits are reached and determined on a motion for summary judgment. *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1213 (9th Cir. 1980) (per curiam); *Sheeran v. General Elec. Co.*, 593 F.2d 93, 98 (9th Cir.), *cert. denied*, 444 U.S. 868,

100 S.Ct. 143, 62 L.Ed.2d 93 (1979). *See also Farina v. Mission Investment Trust,* 615 F.2d 1068, 1074 & n.16 (5th Cir. 1980). *But cf. Libhart v. Santa Monica Dairy Co.,* 592 F.2d 1062, 1066 (9th Cir. 1979) (*Grubbs* rule inapplicable when only *partial* summary judgment is rendered on the factual *issues* before the court). Thus, our jurisdictional inquiry is confined to the question whether the district court would have had jurisdiction over this action had it been filed originally in district court.[1]

The district court held that it would have had original jurisdiction over Noel's suit against the Plan pursuant to ERISA §§ 502(a)(1)(B) and 502(e)(1), 29 U.S.C. §§ 1132(a)(1)(B) and 1132(e)(1). Section 502(a)(1)(B) provides that a "participant" in an ERISA-regulated pension plan may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Section 502(e)(1) provides that state and federal district courts shall have concurrent jurisdiction of actions brought under

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[1]It is unnecessary, therefore, for us to reach the question which would otherwise be presented here: whether this case was properly removed pursuant to 28 U.S.C. § 1441. *Compare Stone v. Stone,* 450 F.Supp. 919, 923 (N.D. Cal. 1978), *with In re Marriage of Pardee,* 408 F.Supp. 666, 667-69 (C.D.Cal. 1976). The different results in *Stone* and *Pardee* reflect the apparent tensions between 28 U.S.C. §§ 1441(a) and (b), on one hand, and section 1441(c) on the other. *See generally* C. Wright, Law of Federal Courts § 39, at 158-59 (3d ed. 1976); Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action",* 46 Minn L.Rev. 1, 25-34 (1961); Note, *Removal under Section 1441(c) of the Judicial Code,* 52 Col.L.Rev. 101, 109-12 (1952).

section 502(a)(1)(B). The district court found that Noel, by virtue of her interest in Ward's benefits, qualified as a "participant" within the meaning of section 502(a)(1)(B).

At first blush, Noel would not seem to qualify as a "participant," as that term is statutorily defined in ERISA § 3(7), 29 U.S.C. § 1002(7).[2] Noel is not an "employee" of an employer served by the Plan and thus would not appear to be a participant. Thus in *Kerbow v. Kerbow,* 421 F.Supp. 1253 (N.D.Tex.1976), a district court held that a non-employee ex-spouse lacks standing to sue under section 502(a)(1)(B). It further found that, because ERISA is generally preemptive, ex-spouses who do not qualify under section 502(a)(1)(B) may not bring any civil action—state or federal—against an ERISA-regulated pension plan to enforce a community property right to plan benefits.

Kerbow has lost its persuasiveness, however, because its reasoning has been undermined by the Supreme Court's subsequent decision in *Campa.* We thus find merit in the district court's reasoning in the instant case: if ERISA permits the transfer of an employee's pension benefit rights to his ex-spouse pursuant to state community property law, then it impliedly authorizes an ex-spouse to enforce

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[2]Section 3(7) states:

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

these rights against the pension plan in federal court. *See Stone v. Stone, supra,* 450 F.Supp. at 921, 933 n.17.

The main stumbling block to accepting the reasoning of the district court is its interpretation of "participant" to mean something other than what the plain words of the statute generally convey. The Supreme Court's summary action in *Campa* sheds some light on this issue, however, and supports the district court's conclusion. *Campa* involved three consolidated appeals. One of these, *Bryant v. Carpenters Pension Trust Fund* (*Bryant*), arose under circumstances similar to those presented by the instant case and *Kerbow*. After the conclusion of the Bryants' dissolution proceeding, Mrs. Bryant sued her former husband and his pension plan for a declaratory judgment establishing her community property share of her husband's pension benefits. The superior court found in favor of Mrs. Bryant, and the California Court of Appeal affirmed. *In re Marriage of Campa*, 89 Cal.App.3d 113, 152 Cal.Rptr. 362 (1979). In dismissing the *Campa* appeal for want of a federal question, the United States Supreme Court necessarily determined that ERISA, including section 502(a)(1)(B), does not foreclose suits in state courts against ERISA-regulated pension plans by spouses seeking to enforce community property interests. At the very least, therefore, we must say that the word "participant," as used in section 502(a)(1)(B), does not exclude an ex-spouse such as Noel from state court. Hence, *Kerbow* was decided incorrectly. Furthermore, because an ex-spouse has a sufficient interest in enforcing ERISA pension rights

to sue in state courts, and because federal courts have concurrent jurisdiction in such cases, ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), we conclude that ERISA §§ 502(a)(1)(B) and 502(e)(1) form an adequate basis for a federal court to assume jurisdiction.

Because of the binding effect of and the necessary ultimate result of *Bryant*, and because of the fundamental soundness of the district judge's conclusion that ERISA would not permit an employee to share a right through marriage yet deny the employee's ex-spouse a federal remedy, we accept the district court's conclusion that Noel qualifies as a "participant" under section 502(a)(1)(B).[3] Thus, Noel's suit against the Plan, if it had been originally filed in the federal court, would have been within the district court's original jurisdiction. The remand of Noel's state claim against Ward is unreviewable on appeal. 28 U.S.C. § 1447(d).

AFFIRMED.

EUGENE A. WRIGHT, Circuit Judge, specially concurring:

I concur, but I do not believe that the district court's jurisdiction rests solely on the fragile inference that ERISA authorizes this suit and grants this plaintiff a remedy. Even if the plaintiff's remedy is provided by state law, the suit

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[3]As we agree with the district court's conclusion that Noel was a "participant" in the pension plan, we need not consider counsel's argument that original jurisdiction also existed pursuant to section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

arises under an act of Congress regulating commerce and is removable on that basis. 28 U.S.C. §§ 1337(a), 1441(a).[1]

A suit arises under an act of Congress regulating commerce if the complaint seeks a remedy granted or implied by the act "or . . . [if] the suit hinges on the interpretation of such an act." *Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir. 1974) (citations omitted), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1569, 43 L.Ed.2d 778 (1975). *See also Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 667 (9th Cir. 1980) (a suit arises under federal law when the complaint presents a substantial dispute over the construction or effect of federal law and the result turns on that dispute).[2]

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[1]ERISA is an act of Congress regulating commerce within the meaning of § 1337. *Leonardis v. Local 282 Pension Trust Fund*, 391 F.Supp. 554, 556 (E.D.N.Y. 1975).

[2]*Spokane County Legal Services* involved general federal question jurisdiction under 28 U.S.C. § 1331, but judicial interpretations of "arising under" are equally applicable to §§ 1331 and 1337. *Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1569, 43 L.Ed.2d 778 (1975).

A suit may arise under federal law even though a federal remedy is not sought. *See, e.g., Gully v. First National Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936) (dictum); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199, 41 S.Ct. 243, 65 L.Ed. 577 (1921). "[F]ederal law creates primary relationships that have dimensions and applications beyond those points at which express remedies are provided." Note, *The Outer Limits of "Arising Under,"* 54 N.Y.U.L.Rev. 978, 1001 (1979). When the plaintiff's claim for a state remedy substantially relies on propositions about federally-governed relationships, and when the dispute over these propositions is likely to prove decisive, the suit arises under federal law. *Id.* at 979, 1004-06.

The plaintiff claims to be directly entitled to benefits as a "participant" or derivatively entitled by virtue of a valid transfer.[3] Both theories of entitlement depend on propositions of federal law.[4] If she could not show that she was a participant within the meaning of ERISA, she would have to show that the transfer of benefits to her was not an "assignment or alienation" prohibited by ERISA to demonstrate that she was the "owner" of the benefits allegedly "converted." *See* ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (plan may not permit assignment or alienation of benefits).

Propositions about ERISA do not enter the case merely to negate the existence of a right based entirely on state law.[5] Instead, they are necessary ingredients of the plain-

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[3]The district court determined that the plaintiff's claim had these elements: "(1) that the employee spouse had a right under the terms of the plan to receive benefits; and (2) that his right was validly transferred to his spouse by the divorce decree." *Stone v. Stone*, 450 F.Supp. 919, 921 (N.D.Cal. 1978).

[4]The first theory undoubtedly relies on federal law, and this reliance alone is probably sufficient to give rise to federal jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 681-83, 66 S.Ct. 773, 775, 90 L.Ed. 939 (1946) (substantial federal claim supports jurisdiction even if claim does not prevail on merits); *accord, Hagans v. Lavine*, 415 U.S. 528, 542, 94 S.Ct. 1372, 1381, 39 L.Ed.2d 577 (1974). In any event, the second theory also relies on federal law. Federal law is essential to both aspects of the claim.

[5]*Cf. Louisville & N.R.R. v. Mottley*, 211 U.S. 149, 150, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908) (plaintiffs asserted contractual right based solely on state law).

The district court apparently thought that, if the plaintiff was not deemed a "participant," her claims would not arise under federal law because her "right to acquire an interest in her spouse's benefits is created solely by state law, as are all spousal rights. . . . That ERISA permits states to create a cause of action for benefits

tiff's asserted entitlement and form "direct and essential element[s] of the plaintiff's cause of action." *See Spokane County Legal Services,* 614 F.2d at 667 (quoting *Smith v. Grimm,* 534 F.2d 1346, 1350 (9th Cir.), *cert. denied,* 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976)).

The district court therefore had jurisdiction whether the plaintiff is a "participant" or the transferee of a participant's rights.[6]

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does not mean that the cause of action arises under federal law." *Stone v. Stone,* 450 F.Supp. 919, 922-23 (N.D.Cal.1978) (citing *Gully v. First National Bank,* 299 U.S. 109, 116, 57 S.Ct. 96, 99, 81 L.Ed. 70 (1936)).

The federal issues, however, include not merely whether ERISA permits the state to create a cause of action but whether the asserted entitlement was based on a valid transfer of benefits under ERISA. The claim of a valid transfer is an element of the cause of action.

[6]The plaintiff also had standing whether or not she is a "participant."

Standing requires an adversary relationship between the parties. *Davis v. Passman,* 442 U.S. 228, 239 n.18, 99 S.Ct. 2264, 2274 n.18, 60 L.Ed.2d 846 (1979). It does not presuppose success on the merits. *See id.*

The plaintiff undoubtedly satisfied the article III requirement of "injury in fact." *See* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure,* § 3531 at 176 (1975) (although standing doctrine is ambiguous, the article III aspect "seems likely to extend only to the requirement that a litigant establish 'injury in fact' resulting from the challenged activity").

She also satisfied the prudential requirement of "some connection between the asserted injury in fact and the protective purpose of the statutory or constitutional provision invoked." *Id.* at 176-77.

Even if she is not a "participant," she is the former spouse of one and transferee of his rights. She alleges an injury directly related to the interests protected by ERISA and arguably among those interests.

Appendix B

Noel Zeona Stone, Plaintiff,

v.

Ward Herbert Stone, Seafarers International Union, Pacific District, Pacific Maritime Association Pension Plan, Does One through Five, Defendants.

No. C-77-1124-CBR.

United States District Court,
N. D. California.

April 18, 1978.

MEMORANDUM OF OPINION

RENFREW, District Judge.

The major issue in this lawsuit is whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1381, preempts California community property laws to the extent that they require employee benefit plans subject to ERISA to pay part of a participant's benefits to his[1] divorced spouse.

I. *FACTUAL AND PROCEDURAL BACKGROUND*

In 1973, plaintiff Noel Zeona Stone ("Noel") instituted divorce proceedings against her husband, defendant Ward Herbert Stone ("Ward"), in the California Superior Court

[1]Throughout this opinion, the Court will generally use the masculine to refer to a participant in a benefit plan and the feminine to refer to the spouse of a participant, because the participant in this case is the husband and the spouse the wife.

for the County of Alameda in the Northern District of California. On September 25, 1974, the Superior Court entered an Interlocutory Judgment of Dissolution of Marriage, and that court entered a final judgment on October 17, 1974, dissolving the marriage and dividing the couple's community property according to the terms of the interlocutory decree. One community asset was a monthly pension of $425.00 which defendant Seafarers International Union, Pacific District—Pacific Maritime Association Pension Plan (the "Pension Plan") had paid Ward since 1970 when he retired from employment covered by the Plan.[2] Under the terms of the interlocutory and final divorce decree, the community property interest in these pension benefits was divided as follows:

> "The community property interest of the parties in the pension being received by the respondent is 80%, and accordingly 40% of the pension is to be paid to the petitioner, which at the present rate of payment of $425.00 is to be $170.00 per month to the petitioner with the petitioner accepting the tax consequences of said payment."

Noel alleges that between the end of 1974 when she obtained her divorce and May 3, 1977, when she filed this action in the California Superior Court for the County of Alameda, Ward failed to comply with his obligations under the terms of the divorce decree. Until May 3, 1977, Noel made no effort to notify the Pension Plan of its alleged obligation to pay 40% of Ward's monthly pension directly

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[2]The parties have stipulated that the Pension Plan is maintained by employers engaged in commerce and by a labor organization representing employees engaged in commerce and is therefore covered by ERISA under § 4(a), 29 U.S.C. § 1003(a).

to her, although she did try unsuccessfully to join the Pension Plan by moving in 1976 to modify the final judgment. The Pension Plan first received written notification of Noel's claim against the Plan on May 9, 1977, when it received in the mail a copy of the summons and complaint in Noel's enforcement action in Superior Court.

On May 25, 1977, the Pension Plan filed a petition for removal of Noel's civil action from the Superior Court, together with a supporting bond. Noel has not moved to remand this action to state court.

At a status conference on July 28, 1977, Noel and the Pension Plan agreed to file cross-motions for summary judgment. Pursuant to that agreement, they entered into a stipulation concerning the material facts. After the parties briefed the issues, the Court heard oral argument on October 13, 1977, and took the motions under submission. On November 30, 1977, the Court sent a letter to counsel for Noel and the Pension Plan requesting them to address two additional issues: whether the division of Ward's and Noel's community property by the Superior Court became effective before or after January 1, 1975; and whether the divorce decree required the Pension Plan to pay directly to Noel her 40% share of the pension benefits. Both Noel and the Pension Plan have responded to this request.

On February 3, 1978, Noel filed a motion for default judgment against Ward after Ward failed to respond to summons mailed to his last known address and printed in a local newspaper of general circulation on six separate occasions.

Having considered the written and oral arguments of counsel, the Court grants Noel's motion for summary judgment against the Pension Plan. In addition, the Court remands Noel's action against Ward to the Superior Court for the County of Alameda.

II. *JURISDICTION UNDER ERISA*

This action was removed to this Court pursuant to 28 U.S.C. § 1441(a), which authorizes the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction."[3] This Court therefore has jurisdiction only if Noel could have brought suit in federal court to enforce her right under the terms of the divorce decree to part of the pension benefits. Although the parties have not addressed this issue, the Court has an independent duty to determine whether it has subject-matter jurisdiction. *Wong v. Bacon*, 445 F.Supp. 1177, 1182 (N.D.Cal.1977).

Intervention in divorce proceedings by federal courts involves them in state domestic relations law, an area traditionally and wisely left to state courts. *See* cases cited at pp. 924-925, *infra*. Exercise of federal juridiction over Noel's action against the Pension Plan is authorized by federal statute and creates none of the problems which this noninterventionist policy is designed to avoid.

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[3]Section 1441(a) provides:

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

The cause of action of a nonemployee spouse against a benefit plan for benefits awarded by a state court in a divorce action has two elements: (1) that the employee spouse had a right under the terms of the plan to receive benefits; and (2) that this right was validly transferred to his spouse by the divorce decree. Proof of neither of these elements requires federal courts to intrude into state domestic relations law.

The first element of the nonemployee spouse's cause of action does not involve state domestic relations law at all. Under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), a participant of a pension plan[4] like Ward has a right to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan * * *." Section 502(e)(1), 29 U.S.C. § 1132(e)(1), gives a participant the right to bring this action in federal courts, which have jurisdiction concurrent with state courts in § 502(a)(1)(B)

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[4]Section 3(7), 29 U.S.C. § 1002(7), defines a participant as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." Throughout this Memorandum of Opinion, the Court uses this term in its technical meaning.

actions.[5] If a participant's cause of action under § 502(a)(1)(B) is transferable to his spouse by operation of state community property laws (*see* n.17, *infra*), federal courts have original jurisdiction over § 502(a)(1)(B) suits brought by nonemployee spouses who were awarded benefits in state divorce actions.

Only the second element of the nonemployee spouse's cause of action, proof of a completed transfer of her husband's rights against the benefit plan to her, has even the potential to involve federal courts in state domestic relations law. However, their actual involvement is in fact slight.

A nonemployee spouse with a present interest in benefits must be able to sue a benefit plan to enforce that interest. If she could not, she would have no remedy for any kind of wrongful failure by the plan to pay benefits to her. A plan's failure could be wrongful not only because of a good-faith but erroneous belief that ERISA preempts state community property laws (as in this case), but also because of a willful, intentional violation by the trustees of their fiduciary duties. In other words, the plan's failure to pay could have nothing to do with the claimant's status as a nonemployee spouse.

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[5]Section 502(e)(1) provides:

"Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section."

The nonemployee spouse's right to sue should not depend on the nature of the reason for the plan's failure to pay her. If the existence of a federal cause of action depended on the defense, a federal court could not know whether it had jurisdiction until the plan answered the complaint, and the well-pleaded complaint rule, which makes federal jurisdiction depend on the complaint, was designed to avoid just this kind of uncertainty and confusion. *See Wong v. Bacon, supra,* 445 F.Supp. 1177; 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3566 (1975) (hereinafter cited as Wright, Miller & Cooper). To deny a nonemployee spouse awarded benefits in a divorce action the right to sue under § 502(a)(1)(b) leaves her dependent on the willingness of her spouse to sue the plan or its trustees on her behalf, which the spouse has little or no incentive to do.

The right of a nonemployee spouse with an interest in benefits to sue a benefit plan does not, however, give her a right to seek a division of community property in federal court whenever pension benefits allegedly constitute a community asset. Federal courts need not become involved in any prospective divisions of community property. That is, until the community property has been divided by court decree or by property settlement, the nonemployee spouse has no enforceable interest in benefits and no enforceable right against the plan. So long as the employee spouse shares equally the management and control of personal community property with his wife during their marriage, Cal.Civ.Code § 5125, she has no separate or superior right to receive all or part of the benefits and no right to sue to enforce this undetermined and inchoate right.

Consequently, a federal court need not decide how community property should be divided under state domestic relations laws. It need decide only how such property has previously been divided by court order or property settlement. That determination involves state contract law more than state community property law because the interpretation of a divorce decree as well as a property settlement depends on the intent of the parties. *In re Marriage of Verner*, 77 Cal.App.3d 718, 143 Cal.Rptr. 826, 830 (1978).[8]

Any suit by a nonemployee spouse to obtain management and control of a community asset would not arise under federal law, and federal courts would therefore lack subject-

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[8]Although the language of the interlocutory decree is ambiguous and although Noel's delay of more than two years after entry of the decree in notifying the Pension Plan of its obligation to her suggests that the decree required only that Ward pay part of his pension benefits to Noel as he received them, the Court concludes that the decree transferred Ward's right to 40% of the pension benefits to Noel and that Noel could therefore enforce the obligation directly against the Pension Plan. When the state court transferred Ward's right to 40% of his pension benefits to Noel, it transferred as well Ward's federal cause of action to enforce that right. *See* n.17, *infra*. Although joinder of the Pension Plan would have been possible, *In re Marriage of Sommers*, 53 Cal.App.3d 509, 126 Cal.Rptr. 220, 223 (1975), it was not necessary. Cal.Civ.Code § 5106, which discharges plans from liability to pay the transferee of an interest in benefits until the plan receives written notice, clearly contemplates that a transfer can be effective without joining a plan in some litigation. Sending written notice to the pension plan is indeed preferable to joinder because it places less of a burden on the pension plan and protects the spouses to an equal degree.

matter jurisdiction.[1] The non-employee spouse's right to acquire an interest in her spouse's benefits is created solely by state law, as are all spousal rights. Even if ERISA preempts some of her spousal rights, it does not replace those rights with any federally created spousal rights. That ERISA permits states to create a cause of action for benefits does not mean that the cause of action arises under federal law. *See Gully v. First National Bank,* 299 U.S. 109, 116, 57 S.Ct. 96, 81 L.Ed 70 (1936). Even if a preemption defense were valid, a federal court does not acquire jurisdiction over a state cause of action merely because the defendant might raise a federal defense. *E.g., Phillips Petroleum Co. v. Texaco, Inc.,* 415 U.S. 125, 127-128, 94 S.Ct. 1002, 39 L.Ed.2d 209 (1974); *Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 152, 29 S.Ct. 42, 53 L.Ed. 126 (1908); 13 Wright, Miller & Cooper, *supra,* § 3566, at 435 n.9.

Nor can a defendant who has a federal defense to a state cause of action remove a lawsuit brought under state law in state court because only those cases that could be brought initially in federal court can be removed under 28 U.S.C. § 1441(a). *Gully v. First National Bank, supra,* 299 U.S. at 116, 57 S.Ct. 96; *State of Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654, 660 (9 Cir. 1972); *Wong v. Bacon, supra,* 445 F.Supp. at 1183; *Borzello v. Charles D. Sooy & C. Darrell Sooy,* 427

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[1]Because of the domestic relations exception, federal courts do not have jurisdiction over marital disputes by reason of diversity of citizenship. *Crouch v. Crouch,* 566 F.2d 486, 487 (5 Cir. 1978); *Buechold v. Ortiz,* 401 F.2d 371, 372 (9 Cir. 1968). If federal courts lack federal-question jurisdiction over such disputes, they lack all subject-matter jurisdiction.

F.Supp. 332, 335 (N.D.Cal.1977); *State of New York v. Local 1115 Joint Board, Nursing Home & Hospital Employees Division*, 412 F.Supp. 720, 723-724 (E.D.N.Y.1976). A divorce action therefore cannot be removed by a benefit plan which is joined as a defendant because it possesses community property subject to the jurisdiction of the state court conducting the proceedings. *See In re Marriage of Sommers*, 53 Cal.App.3d 509, 126 Cal.Rptr. 220, 223 (1975) (joinder of benefit plans).

This case and *In re Marriage of Pardee*, 408 F.Supp. 666 (C.D.Cal.1976), are therefore consistent in their results. In *Pardee*, the court remanded a divorce action removed by a pension plan because the asserted federal claim was not separate and independent from the state action within the meaning of 28 U.S.C. § 1441(c).[8] Insofar as *Pardee* holds that a federal claim is not removable under § 1441 unless the claim is separate and independent from state claims joined with it, the Court respectfully declines to follow it. Unlike the court in *Pardee*, this Court finds it necessary to decide whether the nonemployee spouse has a claim against the Pension Plan upon which relief may be granted under federal law. If the complaint states a federal cause of action, at least that claim is removable. Both the pendent jurisdiction doctrine and § 1441(c) allow federal courts to remand to state courts state claims over which federal courts have

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[8]Section 1441(c) provides:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

no independent jurisdictional basis and which are joined with federal claims within federal court jurisdiction. *See* p. 933, *infra*. But federal courts lack discretion to remand to state courts federal claims properly before them because the federal claims happen to be joined with such state claims.

III. *PREEMPTION BY ERISA*

A state divorce decree requiring the Pension Plan to pay directly to Noel part of the pension benefits due to Ward under the terms of the plan may be invalid under federal law under either of two theories: (1) that the award of part of the benefits to a nonemployee spouse is an assignment or alienation of benefits prohibited by § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1); or (2) that California's community property laws relate to employee benefit plans within the meaning of § 514(a) of ERISA, 29 U.S.C. § 1144(a), and are therefore preempted.

A. *Conflict with § 206(d)(1)*

A state law which conflicts with a federal law is invalid under the Supremacy Clause of the United States Constitution. The Pension Plan argues that an award of a community interest in pension benefits to a nonemployee spouse constitutes an assignment or alienation of benefits within the meaning of § 206(d)(1) of ERISA and that such an award therefore conflicts with that section's prohibition of such assignments and alienations.[9]

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[9]Section 206(d) provides:

"(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

"(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revoca-

A conflict between state and federal statutes exists "where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz,* 312 U.S. 52, 67 [61 S.Ct. 399, 85 L.Ed. 581] (1941); *Jones v. Rath Packing Co.,* 430 U.S. 519, 526, 540-541 [97 S.Ct. 1305, 51 L.Ed.2d 604] (1977)." *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). Courts try to give federal statutes interpretations consistent with state domestic relations policy. Because Congress generally drafts statutes in a way that avoids conflict with state domestic relations law, courts interpret them with the presumption that Congress did not intend to interfere with the operation of that body of state law. *See id.,* at 157, 98 S.Ct. 988, *quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), and citing *Jones v. Rath Pack-*

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ble assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26."

Although under 29 U.S.C. § 1061(b)(1) the anti-assignment provision need not be adopted prior to January 1, 1976, the pension plan must comply with the substance of the anti-assignment rule after the enactment date, September 2, 1974. H.Conf.Rep.No. 93-1280, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Adm.News 5038, 5061, n.4. Since the transfer of the 40% interest in the pension benefits occurred after that date, the transfer is invalid if it conflicts with § 206(d)(1)'s prohibition of assignments and alienations.

ing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977). Both Congress and the courts recognize that " ' "the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." ' " *Buechold v. Ortiz*, 401 F.2d 371, 372 (9 Cir. 1968), *quoting Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383, 50 S.Ct. 154, 74 L.Ed. 489 (1930). Congress does not infringe *sub silentio* "the power to make rules to establish, protect, and strengthen family life [which] is committed by the Constitution of the United States • • • to the legislature of [each state]." *Labine v. Vincent*, 401 U.S. 532, 538, 91 S.Ct. 1017, 1021, 28 L.Ed.2d 288 (1971).

The strength of this rule of statutory construction is demonstrated by the willingness of courts to infer exceptions from statutory rules in order to avoid conflicts with state domestic relations laws. Even before Congress made a statutory exception for spousal and child support obligations from the general rule that all claims against a debtor are dischargeable in bankruptcy, the Supreme Court inferred an exception. *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S.Ct. 172, 49 L.Ed. 390 (1904). Similarly, even when Congress gave federal employees extremely broad control over the benefits they earned, courts inferred exceptions for claims by nonemployee spouses and dependents for child and spousal support. *See* cases cited in *Wissner v. Wissner*, 338 U.S. 655, 659, 70 S.Ct. 398, 94 L.Ed. 424 (1950) (National Service Life Insurance Act). The correctness of this heavy presumption that Congress does not interfere with the workings of state domestic relations law is illustrated by the eventual decision of Congress to create explicit excep-

tions in both these situations. *See* 11 U.S.C. § 35(a)(7) (Bankruptcy Act); 42 U.S.C. § 659(a) (benefits of federal employees).

This policy of federal noninterference with state domestic relations laws means that a federal court does not construe a federal statute to preempt one of those laws unless "positively required by direct enactment," *Wetmore v. Markoe, supra,* 196 U.S. at 77, 25 S.Ct. 172, or, in other words, " 'unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co., supra,* 434 U.S. at 157, 98 S.Ct. at 994, *quoting Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230, 67 S.Ct. 1146. The relationship between § 206(d)(1) and California community property law must be evaluated against this background.

Section 206(d)(1) prohibits most voluntary and involuntary transfers of benefits from the employee who has earned them in order to "ensure that the employee's accrued benefits are actually available for retirement purposes * * *." H.Rep.No. 93-807, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News, pp. 4670, 4734. In other words, § 206(d)(1) generally requires the payment of benefits only to a participant in a pension plan or to a beneficiary designated by him or by the terms of the plan.[10] Application of the com-

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[10]The definition of participant in § 3(7) is set forth in note 4, *supra.* Section 3(8), 29 U.S.C. § 1002(8), defines the term "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." For the sake of simplicity, the Court assumes throughout the following discussion that pension benefits go to a participant rather than a beneficiary.

munity property laws results in the payment of benefits to a third person who is neither a participant nor a beneficiary. In other contexts, Congress has treated the community property laws as effecting a seizure of benefits, *see Wissner v. Wissner, supra,* 338 U.S. at 659, 70 S.Ct. 398 (interpretation of provision exempting benefit payments from "attachment, levy, or seizure"), and for purposes of § 206(d)(1), "a garnishment or levy is not to be considered a voluntary assignment." H.Conf.Rep.No. 93-1280, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News, pp. 5038, 5061. It is at least possible that Congress used the terms assignment and alienation in § 206(d)(1) to include the transfer of benefits under community property laws, and the interests of the employee that § 206(d)(1) is designed to protect are implicated by recognizing a community property interest in pension benefits.

The possibility of a conflict between California community property law and § 206(d)(1) therefore cannot be avoided by categorizing a community property interest as an ownership rather than a creditor interest. Provisions in state and federal statutes analogous to § 206(d)(1) have been held not to defeat community property claims because a nonemployee spouse acquires an interest in community assets not as a creditor or assignee but as an owner, and "[t]he recognition of an ownership claim cannot be described as the levy of execution, garnishment, attachment or assignment of property." *Phillipson v. Board of Administration,* 3 Cal.3d 32, 89 Cal.Rptr. 61, 68, 473 P.2d 765, 772 (1971) (award to nonemployee spouse of community property interest in matured rights to state pension does not constitute assignment, execution, garnishment, or attach-

ment prohibited by state pension law); *see In re Marriage of Hisquierdo,* 19 Cal.3d 613, 139 Cal.Rptr. 590, 592 & n.2, 566 P.2d 224 (1977) (same principle applied to federal benefit statutes with creditor exemption provisions), *petition for cert. filed,* 434 U.S. 963, 98 S.Ct. 500, 54 L.Ed.2d 448 (1977). This mode of analysis focuses on whether the non-employee spouse's claim is an ownership or creditor interest, but the characterization of the interest under state property law does not affect the degree of conflict with the purposes of the federal statute, which determines whether state law is preempted. If the characterization under state property law were dispositive, a spouse entitled to a fair and equitable share of marital property in a non-community property state (*see* p. 931, *infra*) could not collect benefits if the law of that state did not recognize a pre-existing ownership interest as California law does. The substance of the spousal claim to marital property conflicts no more or no less with § 206(d)(1) because of the form in which it is asserted.

Section 206(d)(1) does not explicitly prohibit the transfer of pension benefits under state community property laws, and the plain meaning of the terms assignment or alienation does not include such a transfer. Nor does the legislative history of ERISA clarify this ambiguous language. H.Rep.No. 93-807, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News, pp. 4670, 4695, 4734; H.Conf.Rep.No. 93-1280, 93d Cong., 2d Sess., *id.,* at pp. 5038, 5061. The Court must therefore rely primarily on an analysis of policy considerations in interpreting § 206(d)(1). *See Williams v. Dept. of Social & Health Services, State of Washington,* 529 F.2d 1264, 1271 (9 Cir. 1976). More specifically, the

Court must compare the interest in benefits which the nonemployee spouse has under the community property laws with the interest in benefits asserted by other claimants. If Congress could have had no discernible reason to treat those kinds of interests differently, its clear intent to prohibit the transfer of one kind of interest demonstrates its intent to prohibit the transfer of the other kind. If, on the other hand, the relative interests of husband and wife differ from the relative interests of participant and other claimants, no basis to infer a clear congressional intent to preempt community property laws exists.

The payment of benefits to a nonemployee spouse in satisfaction of her community property claim does not conflict with the purposes of § 206(d)(1). Members of the families of employees are included in the class which ERISA protects. The basic purpose of ERISA is to protect the literally millions of people who depend on benefits from private pension plans for financial independence after retirement. H.Rep.No. 93-533, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News, pp. 4639, 4640-4641; S.Rep.No. 93-127, 93d Cong., 2d Sess., 1974 U.S.Code Cong. & Admin.News, pp. 4838, 4839-4840. Congress was concerned not only about the workers themselves whose employment entitles them to benefits. Congress was also concerned about the families of those workers who depend to the same degree on the actual availability of those benefits. It would be ironic indeed if a provision designed in part to ensure that an employee spouse would be able to meet his obligations to family after retirement were interpreted to permit him to evade them with impunity after divorce. Construing

§ 206(d)(1) to prevent a nonemployee spouse from enforcing marital property obligations against an employee benefit plan covered by ERISA would frustrate rather than further the policies of that provision.

This factor distinguishes community property claims of nonemployee spouses from the claims of business creditors, who are not members of the family unit protected by ERISA. In addition, nonemployee spouses are more likely to be dependent on their share of pension benefits than a business creditor with a variety of customers who own a variety of assets which can be used to satisfy their debts. The nonemployee spouse has a unique and protected interest in obtaining her fair share of pension benefits.

A second reason to conclude that ERISA treats community property interests differently from other claims against benefits is that the nonemployee spouse cannot minimize her losses if her husband fails to honor his obligations to her. The insulation by ERISA of a substantial community asset from her community property claims if the marriage ends in divorce should not lead the nonemployee spouse to anticipate (and perhaps precipitate) that event by limiting her contributions to the marital partnership. The right of an employee to collect a pension from a plan covered by ERISA should encourage, not discourage, a prospective spouse to marry him. Unfortunately, the refusal of spouses to honor their marital obligations after divorce is not an uncommon occurrence, and in cases where pension benefits are the primary or sole community asset, the nonemployee

spouse gets none of her community property unless she can collect benefits directly from the pension plan.[11]

This unavoidable vulnerability of nonemployee spouses contrasts with the position of business creditors. Depriving business creditors of recourse against this kind of asset is fair, becaue they have " 'only themselves to blame for extending credit to a person whose interest under the [benefit plan] had been put beyond their reach' " without first ascertaining the extent and character of the debtor's resources. *United Mine Workers v. Boyle*, 418 F.Supp. 406, 411 (D.D.C.1976) (analogous principle for spendthrift trusts), *aff'd*, 567 F.2d 112 (D.C.Cir.1977), *cert. denied, sub nom. Antal v. Boyle*, ... U.S. ....., 98 S.Ct. 1589, 55 L.Ed. 2d 808 (1978). The nonemployee spouse's need for recourse against pension benefits is therefore substantially stronger than the need of other creditors.

Balanced against the interest of the nonemployee spouse in collecting pension benefits is the interest of the participant in keeping them all for himself, but his claim is not superior to his wife's. Although the employee spouse may

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[11]Defendant contends that the divorce court could, in such cases, order the employee spouse to pay his wife her share of the benefits as he received them and that this approach is consistent with its interpretation of ERISA. This approach assumes, however, that the benefits can be included in a valuation of the couple's community property, which would be improper if ERISA intends to give the employee spouse the entire value of his benefits. This approach is also ineffective in cases where the employee spouse fails to comply with his obligations and places himself beyond the reach of process —cases apparently somewhat analogous to this one. As the Pension Plan itself concedes, this alternative would "foreclose the simplest available method for ensuring compliance with the state court order."

have assumed the obligation to provide the money to support the couple, the nonfinancial contributions of a nonemployee spouse are no less essential or valuable to a marriage, and ERISA does not reject the basic premise of the community property laws that each partner in a marriage deserves an equal share of all marital assets because each made their acquisition possible. *See* pp. 930-931, *infra*. The nonemployee spouse earned those pension benefits no less than her husband, and to allow the husband to keep them all would give him a windfall gain at the expense of his wife. The employee spouse may have to make sacrifices in order to honor his obligation to his wife under the community property laws, but Congress deferred to the decision of the states that this sacrifice is necessary and proper.

In some cases the award of community property to the nonemployee spouse goes far beyond the needs of reasonable support. In those cases, it is legitimate to ask "why the obligee spouse should be treated differently from other creditors of the husband as to that portion of the debt which goes beyond support." Branca, *Dischargeability of Financial Obligations in Divorce: the Support Obligation and the Division of Marital Property*, 9 Fam.L.Q. 405, 434 (1975). However, few couples accumulate so large an estate, and in those cases, the value of the property allocated to the employee spouse as well as the nonemployee spouse would necessarily be substantial. An employee spouse in that situation depends on pension benefits for his own support after retirement to a limited degree at best. Most community property settlements do not make either spouse wealthy. A construction of § 206(d)(1) which preempted community property laws would protect a small and rela-

tively undeserving minority of employee spouses at the expense of a large and relatively deserving majority of nonemployee spouses.[12]

It is true that if a nonemployee spouse's interest in community assets is insufficient to support her after divorce, she is entitled to support payments out of the separate property of her husband. *See, e. g.*, Cal.Civ.Code § 4801. The nonemployee spouse can satisfy her essential needs if she can enforce an order of spousal support directly against the pension fund. Congress and the courts have always preserved the enforceability of support obligations. *See* p. 924, *supra; but see Ogle v. Heim,* 69 Cal.2d 7, 69 Cal.Rptr. 579, 442 P.2d 659 (1968) (right to child support unenforceable against state pension plan); *Miller v. Superior Court,* 69 Cal.2d 14, 69 Cal.Rptr. 583, 442 P.2d

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[12]Even if ERISA prohibits a transfer of the benefits themselves to a nonemployee spouse, it may permit her to be compensated with community property of equal value to her community property interest in pension benefits provided that those other community assets have sufficient value. *See In re Marriage of Milhan,* 13 Cal.3d 129, 117 Cal.Rptr. 809, 528 P.2d 1145 (1974), cert. denied, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467 (1975) (National Service Life Insurance Act); Thiede, The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits, 9 U.S.F. L.Rev. 635, 650 (1975). That approach, however, fails to protect the nonemployee spouse in the many cases where pension benefits constitute the major community asset, and it gives her protection only in those instances where she needs it the least because she is least dependent on her interest in those benefits.

Application of the *Milhan* approach is preferable where feasible because like ERISA, it furthers the employee spouse's interest in receiving the benefits himself. In fact, California courts do just that. *Phillipson v. Board of Administration, supra,* 89 Cal.Rptr. at 70. 473 P.2d 765.

663 (1968) (right to alimony unenforceable against state pension plan). ERISA certainly did not depart from this uniform pattern and preempt spousal support laws.

However, neither ERISA nor the state spousal support laws are intended only to ensure that a nonemployee spouse will have minimal support necessary for survival. ERISA protects the interest in pension benefits even if the family unit will not be destitute without them. Furthermore, spousal support provides more than the basic, irreducible essentials of life. A divorced spouse is entitled to support sufficient to enable her to maintain the life style which she enjoyed before the divorce, *In re Marriage of Wright,* 60 Cal.App.3d 253, 131 Cal.Rptr. 870, 871 (1976) (support order reasonable in light of "the free-spending lifestyle to which the parties had been accustomed"); *In re Marriage of Siegel,* 26 Cal.App.3d 88, 102 Cal.Rptr. 613, 615-616 (1972); Cal.Civ.Code § 4801(a)(7), and the style to which she is accustomed may be far more luxurious than the style to which she could become accustomed if required to do so. The distinction between support and property obligations has collapsed to the point that at least in Indiana, "'alimony serves a dual purpose—a method to aid in the equitable distribution of property and a method to provide continued maintenance or support if deemed appropriate.'" *Nichols v. Hensler,* 528 F.2d 304, 308 (7 Cir. 1976), *quoting Wellington v. Wellington,* 158 Ind.App. 649, 304 N.E.2d 347, 353 (1974).

There is a continuum between property and support obligations.[13] Even though it may be accurate as a broad generalization that nonemployee spouses have a greater need for support than for their share of community property, that fact does not mean that ERISA treats these two kinds of obligations differently. The question is whether the interest of the nonemployee spouse in a fair division of community property (even assuming that it is less than her interest in support) is greater than her husband's interest in keeping pension benefits for himself. For the reasons discussed at pp. 926-927, *supra*, the interest of the nonemployee spouse prevails.

This conclusion is sound despite the fact that some federal laws treat spouses asserting community property claims like business creditors and not like spouses asserting claims for support. Under the Bankruptcy Act, a bankrupt can have debts arising out of his community property obligations discharged even though spousal and child support obligations are nondischargeable. *E. g., Nichols v. Hensler, supra*, 528 F.2d at 307; *Jones v. Tyson*, 518 F.2d 678, 680 (9 Cir. 1975). More analogous to ERISA is the

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[13]Differences between the division of property and the payment of support of course remain. The categorization of the obligation affects its modifiability in light of changed circumstances and its enforceability through the sanction of contempt. *See Goggans v. Osborn*, 237 F.2d 186, 189, 16 Alaska 451 (9 Cir. 1956); *but see In re Marriage of Verner*, 77 Cal.App.3d 718, 143 Cal.Rptr. 826, 833-834 (1978) (contempt sanction for breach of property as well as support obligation) (dictum); *In re Marriage of Fithian*, 74 Cal. App.3d 397, 141 Cal.Rptr. 506, 510-511 (1977). Federal law recognizes certain differences in bankruptcy and tax proceedings. *See* 11 U.S.C. § 35(a)(7); 26 U.S.C. §§ 71(a) and 215.

federal statute governing execution and garnishment of federal pension benefits. Although spouses and children can proceed against government benefit plans to enforce the legal obligations of government employees "to provide child support or make alimony payments," 42 U.S.C. § 659(a), Congress specifically excepted payments "in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. § 662(c), Tax Reduction and Simplification Act of 1977, Pub.L. 95-30, § 501, 91 Stat. 126 (1977); *see Wissner v. Wissner, supra*, 338 U.S. at 659-660, 70 S.Ct. 398 (same result through judicial construction of National Service Life Insurance Act).

The Court cannot, however, determine whether the rationale of these statutes extends to private pension plans as well as federal governmental ones. Section 659 was a part of the Social Services Amendments of 1974 which included no provision defining its terms. Pub.L. 93-647, § 101(a), 88 Stat. 2357 (1975). A rider which included § 662(c) was added to the Tax Reduction and Simplification Act of 1977 on the floor of the Senate in order to fill that gap. Neither the committee reports of the 1975 legislation, S.Rep.No. 93-1356, 93d Cong., 2d Sess., 1974 U.S. Code Cong. & Admin. News, pp. 8133, 8157; Conf.Rep.No. 93-1643, 93d Cong., 2d Sess., *id.*, p. at 8161; nor the committee reports of the 1977 legislation, Conf.Rep.No. 95-263, 95th Cong., 1st Sess. 1977 U.S.Code Cong. & Admin.News, pp. 185, 287; nor the sponsor of the provision which became § 662(c), 123 Cong.Rec. S-6723 (remarks of Sen. Nunn) and S-6727 (explanation of provision) (April 29, 1977), ex-

plained why nonemployee spouses could not collect community property obligations from federal pension plans. ERISA exempts governmental plans from its coverage, § 4(b)(1), 29 U.S.C. § 1003(b)(1), and Congress might well be more reluctant to eliminate community property interests in private pension benefits than in governmental benefits. Private benefit plans cover more workers and pay more in benefits than governmental plans, so preemption of state community property laws with respect to private pension benefits would disrupt state marital property law to a much greater degree than preemption with respect to governmental benefits. Although 42 U.S.C. §§ 659(a) and 662(c) and § 206(d)(1) of ERISA could conceivably be read *in pari materia,* Congress' action in a related field is not a direct enactment which positively requires this interpretation of § 206(d)(1) and which is essential to a finding of preemption in these circumstances.[14]

Even if it were theoretically desirable to except only support obligations and not community property obligations from the general rule against transferability of pension rights, the cost of implementing that rule is prohibi-

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[14]*Wissner v. Wissner, supra,* 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 is not to the contrary. In *Wissner,* the Supreme Court concluded that California's community property law conflicted with a provision of the National Service Life Insurance Act that exempted payments of benefits from the claims of creditors and from legal and equitable process. *Wissner* involved a governmental benefit plan which involves different considerations than private plans. Perhaps more importantly, in the National Service Life Insurance Act, "Congress ha[d] spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.,* at 658, 70 S.Ct. at 400. In ERISA, Congress made no similar expression of its intent.

tive. When couples get divorced, the division of property which they agree to or which the divorce court imposes usually settles both the claims for support and the claims for community property. Although the distinction between support obligations and property division may be clear in theory, "[i]n practice the distinction between the two is often ignored by the courts and by the parties themselves." Branca, *Dischargeability of Financial Obligations in Divorce: the Support Obligation and the Division of Marital Property*, 9 Fam.L.Q. 405, 414 (1975). The imprecise and conflicting criteria for allocating portions of the property settlement between support and property division can be extremely difficult. *Id.*, at 413-431; *In re Smith*, 436 F.Supp. 469 (N.D.Ga.1977). This allocation almost inevitably involves factual disputes and uncertainty, *see Nichols v. Hensler, supra*, 528 F.2d at 308-309 (allocation improper on summary judgment motion), so courts would have to take evidence concerning all the varied factors which determine the amount of a support award[15] in order to determine

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[15]For example, Cal.Civil Code § 4801(a) requires courts to consider the following circumstances in making an award of support:

"(1) The earning capacity and needs of each spouse.

"(2) The obligations and assets, including the separate property, of each.

"(3) The duration of the marriage.

"(4) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.

"(5) The time required for the supported spouse to acquire appropriate education, training, and employment.

"(6) The age and health of the parties.

"(7) The standard of living of the parties.

"(8) Any other factors which it deems just and equitable."

how much the nonemployee spouses needed and deserved for support. Not only does this kind of litigation place another burden on the already overburdened federal court system, but it drains the resources of the parties.

It would be possible to determine what portion of a property settlement is necessary for support and to permit the nonemployee spouse to collect only that portion from the pension plan. Courts can and do make that determination in connection with bankruptcy proceedings and in tax proceedings. *See* n.13, *supra*. But when only the respective interests of the employee and nonemployee spouse in pension benefits are involved, the benefits of that approach do not equal the costs. In this context, it is better to have an easily applied rule that achieves substantial justice between husband and wife than a complicated approach which consumes resources better used for other purposes and which results in an outcome not significantly, if at all, more equitable.

Any burden that compliance with state community property laws might place on benefit plans does not create a conflict with § 206(d)(1) because that section does not protect any interest of plans as plans. Some anti-assignment statutes are designed "to prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the [non-assigning party] to deal only with the [assigning party]." *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 373, 70 S.Ct. 207, 211, 94 L.Ed. 171 (1949) (statute prohibiting assignment of tort claims against U.S. does not prohibit assignments by operation of law). If Congress intended

§ 206(d) to protect plans against these kinds of problems, it would not have permitted, as it did in § 206(d)(2), even voluntary and revocable assignments of up to ten percent of any benefit payment. The Court found no indication in the legislative history of ERISA that the prohibition of certain types of transfers by § 206(d) was designed to protect plans as well as participants and beneficiaries. In any case, the availability of interpleader under Fed.R.Civ.P. 22 enables plans to avoid the risk of double liability and exposure to substantial investigation and litigation expenses when each spouse claims or may claim a right to benefits under a judicial decree or a property settlement. Permitting the transfer of pension rights under state community property laws therefore interferes with no policy of § 206(d)(1).

Community property laws are as integral a part of a state's domestic relations laws as its support laws, so the federal policy of noninterference with state domestic relations policy (*see* pp. 924-925, *supra*) applies to both kinds of laws. Although "the community property principle rests [in part on] the business relationship of man and wife for their mutual monetary profit," *Wissner v. Wissner, supra,* 338 U.S. at 660, 70 S.Ct. at 400, marriage is not primarily a profit-making undertaking in community property states, just as it is not in common law states. The community property laws incorporate and establish the moral obligations of husband and wife as much as their financial ones.

The common law limited the obligation of the wage-earning spouse to the duty of support. Johnston, *Sex and*

Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality, 47 N.Y.U.L.Rev. 1033, 1036 (1972). That limited view of marital obligations has been increasingly rejected in favor of the concept that "marriage is a joint enterprise and shared undertaking, based on a division of labor, which should entitle each spouse to a share of the family assets upon divorce." Inker, Walsh & Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts,* 11 Fam.L.Q. 59, 61 & n.8(1977). This premise that husband and wife contribute equally to the marital partnership, whether financially or otherwise, underlies the marital property laws not only of the eight community property states, *see* Prager, *The Persistence of Separate Property Concepts in California's Community Property System,* 1849-1975, 24 U.C.L.A.L.Rev. 1, 6-7 (1976), but also of the growing number of states (now at least thirty) which give each spouse the right to a fair and equitable share of marital property upon divorce. *See* Prager, *Sharing Principles and the Future of Marital Property Law,* 25 U.C.L.A.L.Rev. 1, 2-4, & nn. 10-13 (1977); Freed & Foster, *Divorce in the Fifty States: An Outline,* 11 Fam. L.Q. 297, 307-308 (1977); Foster & Freed, *Marital Property and the Chancellor's Foot,* 10 Fam.L.Q. 55, 58 & n.14 (1976). Only a dwindling minority of states adhere to the common law philosophy that the wage earner's obligation to his spouse is limited to the obligation of support and that the spouse with legal title to marital property generally keeps it after divorce. *Id.,* at 57 & nn.9-12 and 58 & n.13; Freed & Foster, *Divorce in the Fifty States: An Outline,* 11 Fam. L.Q. 297, 307 (1977).

In ERISA, Congress did not adopt or reject either of these theories of community property. Congress presumptively takes a neutral position with respect to state community property laws, and only when those laws conflict with the policies of federal law does Congress preempt them. Preemption by ERISA of state community property laws would expose nonemployee spouses to the kind of risk from which ERISA is designed to protect the family unit and against which they cannot effectively protect themselves. Preemption would also cause a major change in the division of marital property which a large majority of states seek to achieve because pension benefits constitute a major asset of many marriages. Congress has not directly and clearly expressed its intent to cause these consequences, and neither the history nor the structure of ERISA compels that construction. The policy of § 206(d)(1) does not conflict with the recognition of the community interest of the nonemployee spouse in pension benefits payable from employee benefit plans covered by ERISA.

B. *Preemption under § 514(a)*

Even if California's community property laws do not conflict with § 206(d)(1), they are nevertheless preempted if they relate to employee benefits plans within the meaning of § 514(a), which provides in relevant part that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[16] Federal legislation in a field may be

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[16]Section 514(a) provides:

"Except as provided in subsection (b) of this section, the provisions of this subchapter [concerning reporting, disclosure,

so pervasive that it precludes any state regulation of the same field even though the state and federal laws do not directly conflict. *See Malone v. White Motor Corp.*, ... U.S. ....., ..., 98 S.Ct. 1185, 55 L.Ed.2d 43 (1978).

Section 514(a) certainly was intended to have broad preemptive effect, and state laws which relate to employee benefit plans differently than ERISA relates to them are generally preempted. *Standard Oil Co. of California v. Agsalud,* 442 F.Supp. 695, 706-707 (N.D.Cal.1977). Section 514(a) was not, however, designed to preempt any state law with even the most tangential relation to ERISA. *Cf.*

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vesting, funding and fiduciary duties] and subchapter III of this chapter [concerning plan termination insurance] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

The last sentence of the subsection provides that it "shall take effect on January 1, 1975." Conversely, that section "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." Section 514(b)(1). Although the transfer from Ward to Noel of a 40% interest in pension benefits occurred before that date, ERISA may still preempt Noel's state-created right to proceed against the Pension Plan. The Court assumes for purposes of this motion that Noel's cause of action against the Pension Plan arose after January 1, 1975, when Noel first notified the Plan of its obligation to her under the terms of the divorce decree. *See* Cal.Civ.Code § 5106 (plan has no obligation to pay transferee of interest in benefits until receipt of written notice). The Court also assumes that the transfer of the pension benefits under the terms of the decree did not constitute an act within the meaning of § 514(b)(1). *See Bacon v. Wong,* 445 F.Supp. 1189, 1192 (N.D.Cal.1978) distinction in § 514(b)(1) between causes of action arising and acts occurring before January 1, 1975).

Time Insurance Co. v. Dept. of Industry, Labor & Human Relations, 46 U.S.L.W. 2369, 2370 (Wis.Cir.Ct. Jan. 3, 1978) (ERISA does not preempt state civil rights law applicable to benefit plans). The question is whether the California community property laws fall into this narrow category of laws which affect employee benefit plans but which do not relate to them within the meaning of § 514(a).

Section 514(a) does not preempt community property laws. Congress used § 206(d)(1) to prohibit transfers of interests in benefits to the degree that those transfers interfered with the policies of ERISA. If this specific provision permits such transfers under the community property laws, a general provision like § 514(a) does not prohibit them. The same reasons that make transfers to nonemployee spouses different from transfers to business creditors (see pp. 926-927, *supra*) make community property laws different from other laws which relate to employee benefit plans. The presumption " 'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress,' " *Ray v. Atlantic Richfield Co., supra,* 434 U.S. at 157, 98 S.Ct. at 994, *quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), applies to preemption by § 514(a) just as it does to preemption by § 206(d)(1). The Court cannot find in § 514(a) the clear evidence of congressional intent to preempt state community property laws insofar as they relate to benefit plans that is necessary for a finding of preemption of state domestic relations laws.

This conclusion is consistent with *Standard Oil Co. of California v. Agsalud, supra,* 442 F.Supp. 695, where it was held that Hawaii's state health insurance law was preempted by ERISA. Regulation of benefit plans is an exercise of the police powers of states, but state regulation of benefit plans is not nearly as well established as state regulation of community property. To preclude state regulation of this latter area would involve a much more radical disturbance of " 'the federal-state balance,' " *Jones v. Rath Packing Co., supra,* 430 U.S. at 525, 97 S.Ct. 1305, *quoting United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), than preclusion of state regulation of benefit plans. Accordingly, the presumption against preemption in the area of community property is correspondingly stronger.

A second basis for distinguishing *Standard Oil* involves the effect of preemption on individuals whom the state seeks to protect. Preemption of the Hawaii health insurance law does not prevent Hawaiian workers from bargaining for the benefits which the state statute sought to guarantee. Although part of the reason for the statute may have been to ensure that workers with little bargaining power would obtain those benefits, the intended beneficiaries of the statute were not rendered incapable of achieving the protection. The intended beneficiaries of the California community property laws would be placed at a significantly greater disadvantage by preemption. Preemption would deprive nonemployee spouses of the share in marital assets which they indirectly helped to acquire, and it would leave them without effective remedies against their husbands,

see nn.11 and 12, *supra*. It is more reasonable to believe that Congress was willing to tolerate the adverse consequences of preemption of state health insurance laws than the consequences of preemption of state community property laws.

For these reasons, California's community property laws do not relate to employee benefit plans within the meaning of § 514(a).[17]

IV. *REMAND*

In addition to her claim against the Pension Plan, Noel seeks relief from Ward. The Court lacks pendent jurisdiction over this state claim, and even if it had pendent jurisdiction, it would be an abuse of discretion to exercise it.

Under the pendent jurisdiction doctrine of *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966), a federal court has discretion to hear a state claim joined with a federal claim which shares a "common nucleus of operative fact." The Court of Appeals for this Circuit has consistently refused to allow the joinder of pendent parties as well as pendent claims. *Ayala v. United*

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[17]ERISA does not preempt state community property laws to the extent they authorize the transfer to the nonemployee spouse of her spouse's federal cause of action under § 502(a)(1)(B) as well as the transfer of the right to the benefits themselves. If ERISA permits the transfer of the latter, it permits the transfer of the former. If Congress intended to permit divorced nonemployee spouses to receive their community interest in benefits directly from employee benefit plans, it is reasonable to conclude that Congress intended to give them the means to obtain the benefits which belong to them.

States, 550 F.2d 1196, 1197-1198 (9 Cir.) (citing cases), *cert. granted,* 434 U.S. 1058, 98 S.Ct. 1227, 55 L.Ed.2d 758 (1977). Because Ward is not a party to Noel's federal cause of action against the Pension Plan, her claim against Ward cannot be joined with her claim against the Plan.

Even if the pendent jurisdiction doctrine permitted the joinder of new parties, joinder of Ward would be improper because the claim against Ward has no nucleus of operative facts in common with the claim against the Plan. The Plan's and Ward's obligations to Noel under the divorce decree are completely separate, and recovery from Ward does not involve at all the existence of the transfer of his pension rights to Noel. Exercise of jurisdiction over the claims against Ward would not significantly promote economy of judicial administration.

Section 1441(c) of Title 28 of the United States Code permits under some circumstances the removal of an otherwise non-removable claim that is joined with a separate and independent claim which is removable if sued upon alone.[18] Under its § 1441(c) jurisdiction as well as its pendent jurisdiction, the Court has discretion to remand to state court state claims joined with federal ones. 14 Wright, Miller & Cooper, *supra,* § 3724, at 651-654 (§ 1441(c) jurisdiction); 13 Wright, Miller & Cooper, *supra,* § 3567, at 448-455 (pendent jurisdiction). Under the circumstances of this case, it is appropriate to remand Noel's claims against Ward to state court.

Because Noel's suit against Ward involves a different party and different issues than her suit against the Pension

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[18]See note 8, *supra.*

Plan, retention of jurisdiction over the state claim would conserve few if any judicial resources. *See supra.* Another reason to retain otherwise non-removable claims is to avoid deterrence of the exercise of the right to remove removable matters. 14 Wright, Miller & Cooper, *supra*, § 3724, at 654. Where the removing defendant is not a party to the otherwise non-removable claims, remand of them will not deter the removing defendant from exercising this right because the burden of defending separate actions in state and federal court is not imposed on him.

Retention of jurisdiction over the state claim would also encroach on the authority allocated to state courts in the federal system. Even when a federal court hears the federal aspects of a domestic relations lawsuit, the aspects involving only state matters should be left to the state as a "matter of policy and comity." *Buechold v. Ortiz, supra,* 401 F.2d at 373; *see Overman v. United States*, 563 F.2d 1287, 1292 (8 Cir. 1977) (remand of state claims involving domestic relations after federal claims resolved). Moreover, retention of jurisdiction over state claims unrelated to Noel's federal claims would raise a serious constitutional question: "if the federal cases defining the pendent jurisdiction doctrine reflect the outer limits of permissible federal subject matter jurisdiction, then [28 U.S.C. § 1441(c)] is unconstitutional if extended to" retention of a nonfederal claim in which diversity of citizenship is absent and which bears no relation to any federal question. Wright, Miller & Cooper, *supra*, § 3724, at 649-650 & nn.74-79 (footnotes omitted). Remand of the claims against Ward enables the Court to avoid this question.

V. *ORDER*

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment against defendant Pension Plan is granted.

IT IS HEREBY FURTHER ORDERED that defendant Pension Plan's cross-motion for summary judgment is denied.

IT IS HEREBY FURTHER ORDERED that plaintiff's claims against defendant Ward Herbert Stone are remanded to the California Superior Court for the County of Alameda.

IT IS HEREBY FURTHER ORDERED that counsel for plaintiff shall prepare an appropriate form of judgment, obtain approval as to form from counsel for defendant Pension Plan, and submit it to the Court for execution within ten (10) days of the date of this Memorandum of Opinion.

Appendix C

"DEFINITIONS

"SEC. 3. For purposes of this title:

• • • • •

"(7) The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."

"COVERAGE

"SEC. 4. (a) Except as provided in subsection (b) and in sections 201, 301, and 401, this title shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

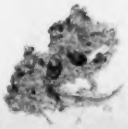
(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

"(b) The provisions of this title shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 3(32));

(2) such plan is a church plan (as defined in section 3(33)) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1954;



(3) such plan is maintained solely for the purpose of complyi ; with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 3(36)) and is unfunded."

"FILING WITH SECRETARY AND FURNISHING INFORMATION TO PARTICIPANTS

"SEC. 104.

* * * * *

"(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

"(1) The administrator shall furnish to e h participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 102 (a) (1)—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 102 which integrates all plan amendments made within such five-year period, except that in a case where no amend-

ments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 102 every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 102(a) (1), a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

* * * * *

"(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b) (3) and such other material as is necessary to fairly summarize the latest annual report.

"(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence."

"REPORTING OF PARTICIPANT'S BENEFIT RIGHTS

"SEC. 105. (a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable."

"OTHER PROVISIONS RELATING TO FORM AND PAYMENT OF BENEFITS

"Sec. 206.

* * * * *

"(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

"(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued non-forfeitable benefit and is exempt from the tax imposed by section 4975 of the Internal Revenue Code of 1954 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of such Code."

"RECORDKEEPING AND REPORTING REQUIREMENTS

"SEC. 209. (a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—* * *

(B) terminates his service with the employer * * *"

"CIVIL ENFORCEMENT

"SEC. 502. (a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).

* * * * *

"(g) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

"EFFECT ON OTHER LAWS

"SEC. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

* * * * *

"(b) (2) (A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

* * * * *

"(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States

applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

"PREMIUM RATES

"SEC. 4006. (a)

* * * * *

"(3) (A) Except as provided in subparagraph (C), the annual premium rate payable to the corporation by all plans for basic benefits guaranteed under this title is—

(i) in the case of a single-employer plan, for plan years beginning after December 31, 1977, an amount equal to $2.60 for each individual who is a participant in such plan during the plan year;

(ii) in the case of a multiemployer plan, for the plan year within which the date of enactment of the Multiemployer Pension Plan Amendments Act of 1980 falls, an amount for each individual who is a participant in such plan for such plan year equal to the sum of—

(I) 50 cents, multiplied by a fraction the numerator of which is the number of months in such year ending on or before such date and the denominator of which is 12, and

(II) $1.00, multiplied by a fraction equal to 1 minus the fraction determined under clause (i),

(iii) in the case of a multiemployer plan, for plan years beginning after the date of enactment of the

Multiemployer Pension Plan Amendments Act of 1980, an amount equal to—

(I) $1.40 for each participant, for the first, second, third, and fourth plan years,

(II) $1.80 for each participant, for the fifth and sixth plan years,

(III) $2.20 for each participant, for the seventh and eighth plan years, and

(IV) $2.60 for each participant, for the ninth plan year, and for each succeeding plan year.

"(B) The corporation may prescribe by regulation the extent to which the rate described in subparagraph (A)(i) applies more than once for any plan year to an individual participating in more than one plan maintained by the same employer, and the corporation may prescribe regulations under which the rate described in subparagraph (A)(iii) will not apply to the same participant in any multiemployer plan more than once for any plan year.

"(C)(i) If the sum of—

(I) the amounts in any fund for basic benefits guaranteed for multiemployer plans, and

(II) the value of any assets held by the corporation for payment of basic benefits guaranteed for multiemployer plans,

is for any calendar year less than 2 times the amount of basic benefits guaranteed by the corporation under this title for multiemployer plans which were paid out of any such fund or assets during the preceding calendar year, the annual premium rates under subparagraph (A) shall be increased to the next highest premium level necessary to

insure that such sum will be at least 2 times greater than such amount during the following calendar year.

(ii) If the board of directors of the corporation determines that an increase in the premium rates under subparagraph (A) is necessary to provide assistance to plans which are receiving assistance under section 4261 and to plans the board finds are reasonably likely to require such assistance, the board may order such increase in the premium rates.

(iii) The maximum annual premium rate which may be established under this subparagraph is $2.60 for each participant.

(iv) The provisions of this subparagraph shall not apply if the annual premium rate is increased to a level in excess of $2.60 per participant under any other provisions of this title.

"(D)(i) Not later than 120 days before the date on which an increase under subparagraph (C)(ii) is to become effective, the corporation shall publish in the Federal Register a notice of the determination described in subparagraph (C)(ii), the basis for the determination, the amount of the increase in the premium, and the anticipated increase in premium income that would result from the increase in the premium rate. The notice shall invite public comment, and shall provide for a public hearing if one is requested. Any such hearing shall be commenced not later than 60 days before the date on which the increase is to become effective.

(ii) The board of directors shall review the hearing record established under clause (i) and shall, not later than 30 days before the date on which the increase is to become

effective, determine (after consideration of the comments received) whether the amount of the increase should be changed and shall publish its determination in the Federal Register."

"PAYMENT OF PREMIUMS

"SEC. 4007. (a) The plan administrator of each plan shall pay the premiums imposed by the corporation under this title with respect to that plan when they are due. Any employer obtaining contingent liability coverage under section 4023 shall pay the premiums imposed by the corporation under that section when due. Premiums under this title are payable at the time, and on an estimated, advance, or other basis, as determined by the corporation. Premiums imposed by this title on the date of enactment (applicable to that portion of any plan year during which such date occurs) are due within 30 days after such date. Premiums imposed by this title on the first plan year commencing after the date of enactment of this Act are due within 30 days after such plan year commences. Premiums shall continue to accrue until a plan's assets are distributed pursuant to a termination procedure, or until a trustee is appointed pursuant to section 4042, whichever is earlier."

"SUITS BY AND AGAINST
LABOR ORGANIZATIONS

"SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having

jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

"(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

"(e) For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his

acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

"RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

"SEC. 302.

* * * * *

"(c) The provisions of this section shall not be applicable * * * (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the

representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

Appendix D

In the United States Court of Appeals
for the Ninth Circuit

Carpenters Pension Trust for Southern California, Appellant, vs. Brenda Ann Kronschnabel, Appellee.	No. CA 79-3032

[Filed Aug. 18, 1980]

ORDER

Pursuant to the Stipulation of the appellant and appellee in the above matter and good cause appearing therefore,

IT IS HEREBY ORDERED as follows:

1. This matter is hereby consolidated, for all purposes, with *Stone v. Stone,* No. 78-2313.

2. Appellee has waived her right to file a responsive brief, and no further brief shall be filed in this matter.

3. Oral argument is waived by both sides.

4. The matter shall be taken under submission for decision at the same time as the case of *Stone v. Stone,* No. 78-2313.

5. The briefs, including the briefs of *amicus curiae* in the matter of *Stone v. Stone,* No. 78-2313, as well as the

matters considered on oral argument in said case, shall be considered and shall be deemed filed in this matter.

DATED: 8-7-80

/s/

Judge
United States Court of Appeals

Appendix E

Carpenters Pension Trust for Southern California,
Plaintiff-Appellant,

v.

Brenda Ann Kronschnabel,
Defendant-Appellee.

No. 79-3032.

United States Court of Appeals,
Ninth Circuit.

Submitted July 23, 1980.
Decided Sept. 29, 1980.
Rehearing Denied Nov. 24, 1980.

Appeal from the United States District Court for the Central District of California.

Before WRIGHT, GOODWIN and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Carpenters Pension Trust for Southern California (the Trust) brought an action for declaratory relief against Brenda Ann Kronschnabel (Brenda), contending that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, prevented the state court from requiring direct payment to a non-participant of a pension plan. The Trust appeals from the district court's order dismissing its action. We affirm.

I

The Trust is an employee pension benefit plan governed by the provisions of ERISA. In 1964, Brenda married Daniel Kronschnabel (Daniel), who, during a portion of their marriage, participated in and earned the right to future retirement benefits from the Trust.

On March 9, 1977, the California Superior Court for Kern County entered a final judgment dissolving the Kronschnabels' marriage. Approving the terms of its interlocutory judgment issued on July 29, 1976, the superior court found that Daniel's pension rights were community property. Accordingly, it awarded Brenda a one-half interest, representing her community property share, in Daniel's pension rights in the Trust. The court further stated that it "reserve[d] and retain[ed] jurisdiction over the issue of the payment of the community property benefits in the Carpenters Pension Trust for Southern California" to both Brenda and Daniel. Although the court denied Brenda's motion to join the Trust as a party to the dissolution proceedings[1], it held that service of a certified

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[1]It is unclear why the superior court denied Brenda's motion to join the Trust. The motion was denied on September 15, 1976. Nine months earlier, the California Court of Appeal had ruled that existing California joinder rules permitted joinder of a pension plan to a dissolution action when it appeared that the marital community might have an interest in pension benefits. *In re Marriage of Sommers*, 53 Cal.App.3d 509, 126 Cal.Rptr. 220 (1975). Recently enacted provisions of the California Civil Code, effective January 1, 1978, have since established a special procedure for joinder of an employee benefit plan as a party to a dissolution action. *See* Cal. Civ.Code §§ 4351, 4363, 4363.1, 4363.2, 4363.3 (West Supp. 1979). Thus, California law now explicitly provides that employee benefit plans may be joined to dissolution actions.

copy of its interlocutory decree upon the trust would place the Trust on notice of Brenda's interest in her husband's pension benefits. The parties before us apparently agree that the effect of the state court's order is to require the Trust to pay directly to Brenda a one-half share of Daniel's monthly pension benefits as they become payable.

The Trust brought the instant action in the district court pursuant to ERISA § 502(a)(3)(B)(ii), 29 U.S.C. § 1132(a)(3)(B)(ii), which, in conjunction with § 502(e)(1), 29 U.S.C. § 1132(e)(1), permits a fiduciary of an ERISA-regulated employee benefit plan to sue in federal district court to enforce the provisions of the plan or ERISA. The Trust sought a judgment declaring that ERISA preempts a state-court dissolution order to the extent that it requires the trustee of a pension plan to pay a portion of a participant's[2] pension benefits directly to his or her divorced spouse. The district court held that ERISA preempts neither state community property laws nor state-court orders requiring an ERISA-regulated pension plan to pay to an ex-spouse a community property share in the employee spouse's pension benefits.

The Trust concedes that ERISA does not preempt California's treatment of ERISA pension rights that derive from employment during marriage as community property. *Cf. In re Marriage of Brown,* 15 Cal.3d 838, 126 Cal.Rptr.

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[2]ERISA § 3(7), 29 U.S.C. § 1002(7), defines a "participant" as "any employee or former employee of an employer, or any member of [sic] former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."

633, 544 P.2d 561 (1976) (pension rights, even if not yet vested, are community property). The sole question before us, therefore, is whether a state court may require the trustees of an ERISA-regulated pension plan to pay some portion of pension payments directly to a participant's ex-spouse.

II

In *In re Marriage of Campa*, 89 Cal.App.3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028, 100 S.Ct. 696, 62 L.Ed.2d 664 (1980), the California Court of Appeal held that ERISA does not preempt a state-court order in a dissolution action that requires the trustees of a pension plan to divide pension payments between the employee and his or her ex-spouse. The California Supreme Court denied the pension plan's petition for a hearing. 89 Cal.App.3d at 132, 152 Cal.Rptr. at 362. The plan appealed to the United States Supreme Court. On January 14, 1980, the Supreme Court dismissed the pension plan's appeal for want of a substantial federal question. 100 S.Ct. 696 (1980). We believe that the Court's summary dismissal in *Campa* controls the instant case, and requires us to affirm.

A summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question, when the federal question is properly presented and within the Supreme Court's appellate jurisdiction under 28 U.S.C. § 1257(2), operates as a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975). *See also* R. Stern & E. Gressman, Supreme Court Practice 324 (5th ed. 1978); C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and

Procedure: Jurisdiction § 4014 at 638-39 (1977). The Court has further elaborated that:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

Mandel v. Bradley, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (per curiam). *See also Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83, 99 S.Ct. 983, 989-990, 59 L.Ed.2d 230 (1979); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation,* 439 U.S. 463, 476 n.20, 99 S.Ct. 740, 749 n.20, 58 L.Ed.2d 740 (1979); *Hawaiian Tel. Co. v. Hawaii,* 614 F.2d 1197, 1198 (9th Cir. 1980) (per curiam).

In applying the foregoing principles to the case before us, we must first examine the jurisdictional statements[3]

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[3]Rule 13 of the Supreme Court Rules provides that an appellant must file with the court "a printed statement as to jurisdiction" in support of an appeal. Rule 15 sets forth the required contents of a jurisdictional statement. Among other things, the jurisdictional statement must indicate "[t]he questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail." Sup.Ct.R. 15, subd. 1(c). Rule 15, subd. 1(c) further provides: "The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." The

in *Campa* and determine the precise questions presented in that appeal. The jurisdictional statement in *Campa* set forth the questions on appeal as follows:

> 1. Do the provisions of Title I of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee benefit plan covered by that Act?
>
> 2. Does a state court have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan?

Our examination of the opinion of the California Court of Appeal in *In re Marriage of Campa, supra*, convinces us that the jurisdictional statement's description of the questions on appeal was accurate. Thus, in dismissing the *Campa* appeal for want of a substantial federal question, the Supreme Court necessarily considered and rejected the argument that ERISA preempts a state-court order requiring the trustees of a pension plan to divide pension payments between the employee and his or her ex-spouse.

In a brief filed in *Stone v. Stone*, 632 F.2d 740 No. 78-2313 (9th Cir. Sept. 29, 1980), a case consolidated for purposes of briefing and argument with the one presently before us,

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Court in *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977) (per curiam) and *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83, 99 S.Ct. 983, 989-990, 59 L.Ed.2d 230 (1979), made it clear that the questions presented in the jurisdictional statement largely govern the precedential effect of a summary dismissal for want of a substantial federal question.

the Trust contends that the Supreme Court's summary dismissal of the *Campa* appeal is not binding precedent. The Trust points out that on the same day that the court dismissed *Campa* it also denied certiorari in *In re Marriage of Johnston*, 85 Cal.App.3d 900, 149 Cal.Rptr. 798 (1978), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 709, 62 L.Ed.2d 672 (1980), which presented issues identical to those in *Campa*, and took summary action in *Johns v. Retirement Fund Trust*, 85 Cal.App.3d 511, 149 Cal.Rptr. 551 (1978), *appeal dismissed* and *cert. denied*, 444 U.S. 1028, 100 S.Ct. 696, 62 L.Ed.2d 664, 696 (1980). In *Johns*, the court both dismissed the appeal for want of jurisdiction, and, "[t]reating the papers whereon the appeal was taken as a petition for writ of certiorari," denied certiorari. The Solicitor General submitted an amicus curiae brief for the United States in both the *Johns* and *Johnston* cases. In this brief, the Solicitor General observed that both the case presently before us, and its companion *Stone v. Stone, supra,* were before this circuit. The Trust urges that the Supreme Court, having this information, postponed plenary consideration to await a decision by this court resolving the preemption issues. From this speculative premise the Trust argues that the Court did not actually reach the merits in *Campa*, and hence that *Campa* does not bind us here.

The flaw in the Trust's argument is that the Court has explicitly stated, in, *e. g., Hicks v. Miranda, supra*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 and *Mandel v. Bradley, supra*, 432 U.S. 173, 97 S.Ct. 2238, 53 L.Ed.2d 199, that *all* dismissals of appeals from state court for want of a substantial federal question are decisions on the merits. While

a summary disposition of a state-court appeal may have less precedential effect upon subsequent Supreme Court decisions than would an opinion issued after briefs and argument, *see, e. g., Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974); R. Stern & E. Gressman, Supreme Court Practice 327-30 (5th ed. 1978), a summary dismissal for want of a substantial federal question fully binds the lower courts. The *Campa* appeal definitively presented the question whether ERISA pre-empts state-court orders directing a pension plan to pay a community property share of a participant's monthly benefits to his or her ex-spouse. The Supreme Court has answered that question in the negative. We are not at liberty to disregard the Court's ruling.[4]

AFFIRMED.

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[4]Counsel for the Trust suggests that the Court's action in *Campa* should be read as a denial of certiorari, which has no precedential value, *see Hawaiian Tel. Co. v. Hawaii*, 614 F.2d 1197, 1198 (9th Cir. 1980) (per curiam), rather than as a dismissal of an appeal. Counsel urges that *Campa* did not uphold the validity of a state statute, *see* 28 U.S.C. § 1257(2) (appellate jurisdiction of Supreme Court over state-court decisions), but instead involved the construction of a "title, right, privilege or immunity" available pursuant to the Constitution, laws, or treaties of the United States, 28 U.S.C. § 1257(3) (certiorari jurisdiction over state-court decisions), and that the Supreme Court was therefore without appellate jurisdiction. We conclude that this argument is unpersuasive. We find it difficult to assume that the Court meant something other than what it specifically said. Further, that the Court dismissed the appeal appears clear from the jurisdictional statement in *Campa*, which made specific reference to the state statutes that authorize a California superior court to order a pension plan to make payments to an ex-spouse of a plan participant.

Appendix F

United States Court of Appeals
for the Ninth circuit

Noel Zeona Stone, Plaintiff-Appellee, vs. Ward Herbert Stone, Defendant, and Seafarers International Union, Pacific District, Pacific Maritime Association Pension Plan, Defendant-Appellant, and Carpenters Pension Trust for Southern California, Intervening-Appellant.	No. 78-2313 D.C. No. C-77-1124 CBR

ORDER

Appeal from the United States District Court
for the Northern District of California

[Filed Nov. 24, 1980]

Before: WRIGHT, GOODWIN and WALLACE,
Circuit Judges.

The panel as constituted above has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is rejected.